84-328

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CASE NO. 84-

IN THE SUPREME COURT OF THE UNITED STATES
October Term , 1984

GEORGE WASHINGTON COOPER, III
and JERRY HERBERT JONES,

Petitioners

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

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C. EUGENE LOFTIN
220 East Forsyth Street
Jacksonville, Florida 32202
(904) 355-7350

Attorney for Petitioners

37pp

QUESTIONS PRESENTED

Whether copyright infringements are within the purview of Title 18, U.S.C. Section 2314 which prohibits the interstate transportation of "goods, wares, merchandise, securities or money of the value $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;"?

Whether the common law phrase "goods, wares or merchandise" can be expanded by statutory construction to include copyrights in the absence of any legislative history that Congress intended a criminal statute, Title 18, U.S.C. Section 2314 to apply to copyrights?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

In addition to Cooper, Jones and the respondent, the proceedings before the Eleventh Circuit Court of Appeals included Larry Drum, Ferrol 'Bud' McKinney, Curtis R. Snipes, Frances Lockamy and John C. McCulloch. John C. McCulloch has filed a petition for writ of certiorari herein which has been assigned S.Ct. No. 84-5163.

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Petitioners George Washington Cooper, III and Jerry Herbert Jones respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on June 8, 1984.

OPINIONS BELOW

The order of the trial court in denying motions to dismiss is contained in Appendix A. The opinion of the United States Court of Appeals for the Eleventh Circuit is contained in Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on June 8, 1984. A petition for rehearing was denied. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The focal point of this case is the interpretation and construction of Title, 18 U.S.C. Section 2314 which relates to the interstate transportation of stolen property (ITSP). This statute is set forth in Appendix D.

The operative facts include copyright infringement activities. Pertinent sections of the copyright statute, Title 17, Sections 106 and 506 are contained in Appendix E.

STATEMENT OF THE CASE

George Washington Cooper, III and Jerry Herbert Jones were indicted in Jacksonville, Florida. The indictment is interwoven with references to Title 18 U.S.C. Section 2314 which relates to the interstate transportation of stolen property (ITSP). The indictment contains seventy-eight (78) counts.

A conspiracy in violation of Title 18, U.S.C. Section 1962 (c)

through a pattern of racketeering activity as defined by Title 18, U.S.C. Section 1961 is alleged in count one. The government premised its case on the concept that the aggregation of sounds fixed on copyrighted recordings were reproduced without authorization of the copyright owner and transported in interstate commerce and this activity violated Title, 18 U.S.C. Section 2314.

Violations of Title 18, U.S.C. Section 1343 (information to avoid detection communicated between the parties to the scheme) and Title 18, U.S.C. Section 1341 (use of the mails to execute the scheme) are also alleged in count one as part of the conspiracy.

Violations of Title 18, U.S.C. Section 1961(4) are alleged in count two which incorporates all allegations of count one; the violation is by reason of a group of individuals associating to operate an eight track and cassette tape copyright infringement scheme. The pattern of racketeering activity charged included violations of Title 18, U.S.C. Section 2314 which were alleged as substantive offenses in counts three through ten; these consisted of the interstate transportation of unauthorized copies of sound recordings.

Violations of Title 18, U.S.C. Section 1343 (wire fraud) in implementing the violations of Title 18, U.S.C. Section 2314 are also alleged in count two and these are charged separately as substantive offenses in counts eleven through forty-nine.

A violation of Title 18, U.S.C. Sections 106(1)(3) and 506(a) is alleged in count fifty consisting of a conspiracy to infringe the copyright in various sound recordings.

Violations of Title 17, U.S.C. Sections 106(3) and 506(a) are alleged in counts fifty-one through seventy-seven which are various copyright infringements. These same substantive facts are the basis for the violations of the conspiracy, racketeering and ITSP counts.

Jones and Cooper urged in a motion to dismiss that the

indictment was defective because the copyright infringements alleged were not sufficient to constitute an ITSP violation and the RICO counts were poisoned by the defective ITSP concept. The tapes copied were legitimately acquired and the subsequent copyright infringements could not amount to "stolen property" within the meaning of 18 U.S.C. Section 2314. The motions were denied, Appendix A. Motions to suppress raised the same point, the wiretaps utilized to gather evidence were authorized for the ITSP charges on the concept that a copyright infringement can be the underlying offense for a Section 2314 violation and defendants urged that the interception of wire communications authorized by Title 18, U.S.C. Section 2516 was not permissible on the facts submitted.

The trial began in early January of 1981 and the jury began deliberations on March 2, 1981 with a verdict being returned on March 4, 1981. Cooper and Jones were convicted of a RICO conspiracy, a RICO substantive offense, ITSP counts, wire fraud and a conspiracy to violate a copyright. They were sentenced on each count.

The issues raised prior to trial were addressed on appeal; the opinion, *United States v. Drum* (slip opinion 11th Cir. 1984) Appendix B, states:

> "In this consolidated appeal, all defendants-appellants claim the ITSP counts must fail because the pirated tapes in issue were copied from legitimately acquired phonorecords, and thus they were not "stolen" property within the meaning of 18 U.S.C. Section 2314.
>
> Extending this argument further, the appellants contend that the invalidity of their ITSP convictions nullifies sufficient predicate acts to sustain the RICO convictions. They further argue that the Wire Fraud convictions must be set aside because the wiretaps utilized to gather certain evidence for their convictions were authorized for the investigation into the

ITSP charges."

***

The principal issue in this appeal is whether the National Stolen Property Act, 18 U.S.C. Section 2314 proscribes the conduct of the defendants in this case. Under Section 2314, it is a federal felony to transport 'in interstate commerce any goods, wares (or) merchandise . . . of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud . . .' The appellants maintain that the transportation of unauthorized copies of tapes is not a violation of Section 2314 because copyrights are not 'goods, wares or merchandise', and cannot be characterized as 'stolen, converted or taken by fraud' within the meaning of the statute.

[1] This contention was recently rejected in *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984), in which it was held that the intangible idea protected by a copyright is effectively made material by its embodiment upon tape and therefrom constitutes 'goods, wares, or merchandise' that may be 'stolen, converted or taken by fraud.' Id. at 1520

The appellants attempt to distinguish *Gottesman* by pointing out that *Gottesman* involved the reproduction of stolen copyrighted works whereas here the recordings reproduced here were acquired from legitimate sources. They cite the Fifth Circuit Court of Appeals decision in *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), to support this view. The court there held that the reproduction and interstate transportation of legitimately acquired copyrighted works does not constitute an offense under Section 2314.

This distinction is not meaningful when considred in light of the purposes of the statute. The evil which

> Congress addressed in the National Stolen Property Act was the interstate traffic in stolen property. Where, as here, copyrighted material has been reproduced and distributed without the authority of the copyright owners, the property rights of owners are certainly affected adversely.
>
> We have previously noted that copyrights, once given tangible form, may be 'stolen, converted or taken by fraud' and fall within the reach of Section 2314.
>
> ***
>
> We disagree with the distinction made in *Smith* and urged by the appellants, finding the genesis of their unauthorized appropriations irrelevant to the charges against them. Simply stated, legitimate acquisition of copyrighted material does not ameliorate the effect of subsequent illegal duplication and distribution of material. ***"

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case because of the direct conflict between *Drum*, the subject case from the Eleventh Circuit and *United States v. Smith*, 686 F.2d 234 (5th Cir, 1982). The *Drum* decision specifically acknowledges the conflict with *Smith*. In *Smith*, video tapes were made of movies in violation of the copyrights thereon from television broadcasts and distributed in interstate commerce. The defendants were prosecuted under the theory that such activity triggered the provisions of Title 18, U.S.C. Section 2314. The convictions were reversed in *Smith* which specifically held that a violation of a copyright by unauthorized recordings does not constitute a violation of Section 2314. There is no meaningful factual distinction between *Drum* and *Smith*.

1. The Importance of the Question Presented

In the Fifth Circuit, a prosecutor may not utilize a copyright

infringement as the basis for alleging a violation of Section 2314. However, in the Eleventh Circuit, a prosecutor can allege copyright violations as the underlying basis for violations of Section 2314 and then utilize those as the predicate acts for RICO violations. It is self evident that such disparity in statutory interpretation erode public confidence in the judicial system. Nothing can be more basic than the requirement of uniform application of a federal criminal statute in the different states.

2. The Copyright Statute:

Title 17, U.S.C. Section 106 grants the owner of a copyright, the exclusive right to 1) reproduce the copyrighted work, 2) to prepare derivative works, 3) to distribute copies to the public, 4) to perform the copyrighted works publicly and 5) to display the copyrighted work publicly.

Smith, supra, makes the following observation:

> "As the term itself suggests, and the definitions confirm, a copyright is nothing more than an incorporeal, intangible right of privilege to engage in or to authorize certain activity. Indeed, section 202 of the Copyright Act states:
>
> > Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.
>
> Consequently, a 'copyright', together with the

> exclusive rights and privileges associated with the copyright, does not implicate any tangible embodiment of the work. Additionally, ownership of a copyright does not encompass ownership of the words, sounds, pictures, or images embodied in the tangible object. In other words, a copyright is independent of both its physical manifestation and the very thing that is copyrighted." at p. 239-240."

3. Strict Construction of Section 2314 Required:

As noted in *Smith* in citing *Merrill v. United States,* 338 F.2d 763, 770 (5th Cir. 1964) quoting *Prussian v. United States,* 282 U.S. 675, 677, 51 S.Ct. 223, 224, 75 L.ed 610 (1931), a criminal statute must be strictly construed. Section 2314 prohibits the interstate transportation of "any goods, wares, merchandise, securities or money with a value of $5,000 knowing same to have been stolen, converted or taken by fraud;" it also specifically identifies forged or counterfeited securities, tax stamps, a forged traveler's check or tool to be used in forging any security or tax stamps. Copyrights are not identified and the question becomes whether a copyright falls within the definition of "goods, wares or merchandise". In *Drum,* the Eleventh Circuit adheres to a view in *United States v. Gottesman,* 724 F.2d 1517 (11th Cir 1984):

"the intangible idea protected by a copyright is effectively made material by its embodiment upon tape and therefore constitutes 'goods, wares or merchandise' that may be stolen, converted or taken by fraud.' "

***

> "The rights of copyright owners in their property are just as deserving of protection as those of the owners of other types of property. See *States v. Belmont,* 715 F.2d 459, 461 (9th Cir. 1983), cert. denied - U.S. -, 104 S.Ct. 1275, 79 L.Ed.2d 679 (1984)."

The test is not whether an appellate court thinks copyrights "are deserving of protection" or whether Congress had the

power to include copyrights within the purview of Section 2314 but whether the words used show that Congress intended that the copyright be included.

Statutes are to be interpreted with reference to the common law and generally be given their common law meaning absent some indication to the contrary. *Isbrandtsen Co. v. Johnson,* 343 U.S. 779 at 783, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). There are no clues in the common sense usage of the words "goods, wares or merchandise" which suggest that Congress could have meant for copyright infringements to have been embodied in those terms. The Eleventh Circuit has acknowledged that where a Federal Criminal Statute uses a common law term without defining it, the term is given its common law meaning. *United States v. Guilbert,* 692 F.2d 1340 (11th Cir. 1982) at page 1343.

4. Ambiguity Should Be Resolved in Favor of Lenity:

Petitioners do not submit that strict construction means deleting anything from the statute or depriving Congress of anything which Congress intended. It does mean that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States,* 401 U.S. 808, 28 L. Ed 2d 493, 91 S.Ct. 1056 (1971).

In this case and *Gottesman,* supra, no inquiry is made into the common law meaning of the terms "goods, wares or merchandise". We can find no dictionary definition that includes copyright infringements within the definition of "goods, wares or merchandise". In *Smith* there was a search for the general dictionary definition of the terms. Nothing was found which discloses that the common law concept of "goods, wares or merchandise" includes a copyright. It is possible, apparently, to surmise through abstract thought and speculation that a copyright is merchandise . . . wares or goods. However, such an exercise is not strictly construing a criminal statute. *Toussie v. United States,* 397 U.S. 112, 25 L. Ed.2d 1,

90 S.Ct. 858 contains this language:

> "As we have said before: when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

5. Legislative History:

Congressional intent is controlling in construction of Federal Statutes. In ascertaining Congressional intent, it is appropriate to examine the legislative history. There is nothing in the legislative history of Section 2314 which indicates "goods, wares or merchandise" are to include copyrights. *Smith* notes that copyrights and copyright infringement activity were never mentioned in the legislative history of the NSPA. In *Rewis* supra, an issue was raised as to whether a gambling operation frequented by out of state bettors violated the Travel Act (18 U.S.C., Section 1952) which prohibits interstate travel in furtherance of certain criminal activity. The fact that this particular factual situation was not discussed in the legislative history was considered a strong suggestion that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another state. This excerpt from *Rewis* is pertinent:

> "In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of Section 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolve in favor of lenity."

Rewis was controlled, in effect by what Congress did not say. *Smith* tracks the history of NSPA from its predecessor

NMVTA, National Motor Vehicle Theft Act and notes that the history shows its purpose was to assist the states in coping with the interstate transportation of tangible property, 'as those terms were and are, commonly used and understood.'

> "*** Indeed, copyrights and copyright infringement were never mentioned in the legislative history of the NSPA. Of course there would be no need for Congress to utilize the commerce clause in order to gain jurisdiction over activities involving copyrights. *** Copyright infringing activity was already federalized and controlled with specific legislation.***"
>
> ***
>
> "The most striking lesson to be learned from the passage of the 1976 Copyright Act is Congress' obvious refusal to allow copyright infringing activity be punished by felony provisions. To be sure, such provisions are an integral part of section 2314 and precisely the reason the Government chose to prosecute defendant Smith under the NSPA. Equally striking is the fact that the 1976 Copyright Act makes no distinction between copyright infringing activity that implicates interstate commerce or is purely intrastate in nature. ***" at page 246
>
> ***
>
> "Without question, Congress was aware of the problem of film piracy, which resulted from recent developments in technology. To a large extent, the relatively new forms of piracy were considered to be a problem because there was no effective mechanism for combating them. Accordingly, Congress was specifically requested to provide felony punishment to curb the problem. This request made no distinction between film piracy involving interstate or

> foreign commerce and piracy that was strictly interstate. In any event, the relevant Senate Committee provided felony provisions in its version of the Act, while the House version provided only for fines and misdemeanor terms of imprisonment. A final version of the Act, which resulted from a Conference Committee, rejected the specifically requested felony provisions and incorporated the House version's misdemeanor provisions." at pages 248-249

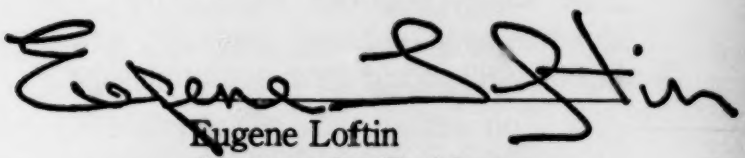
Smith also observes that on May 28, 1982, the President signed into law the Piracy and Counterfeiting Amendments Act of 1982. This Act provides a graduated punishment scheme for various copyright infringing activities, including distribution in violation of a copyright owner's exclusive rights. The necessity for these increased punishment provisions was Congress' apparent belief that no felony punishment provisions applied to copyright infringing activities. If Section 2314 which provides for $10,000 fines and/or 10 years imprisonment included copyright infringements, the Piracy Act of 1982 would have been unnecessary.

CONCLUSION

It is an encroachment upon the lawmaking prerogative of Congress to expand the concept of "goods, wares or merchandise" to include copyrights. There is no rule of statutory construction which permits an expansion of a common law phrase in a criminal statute such as "goods, wares or merchandise". If technology and types of property are changed, it is the exclusive province of Congress to address such changes with criminal statutes deemed appropriate by Congress. Copyrighted works exist in every city, town, or hamlet. The construction or applicability of Section 2314 to copyright infringements in the Fifth Circuit can not be reconciled with the interpretation given that statute in the Ninth and Eleventh Circuits.

To resolve this conflict, the writ should be granted.

Respectfully submitted,



Eugene Loftin
Attorney for Petitioners
220 East Forsyth Street
Jacksonville, Florida 32202
(904) 355-7350

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO.: 80-67-Cr-J-M

UNITED STATES OF AMERICA

vs.

JERRY HERBERT JONES
JOHN C. McCULLOCH
CURTIS R. SNIPES
FERROL "BUD" McKINNEY
ROBERT LEE NATIONS
GEORGE WASHINGTON COOPER, III
JACK REEVES WYNN, III

ORDER

This cause is before the Court on motions to dismiss filed by defendants George Washington Cooper, III, Jerry Herbert Jones, Ferroll "Bud" McKinney, Robert Lee Nations, Curtis R. Snipes, John C. McCulloch and Jack Reeves Wynn, III. Defendant George Washington Cooper, III, has moved the Court for permission to adopt defendant Jerry Herbert Jones' motion to dismiss. The requested permission is hereby granted. Defendant Curtis R. Snipes has adopted the motion to dismiss filed by defendant Robert Lee Nations, and defendant Ferrol "Bud" McKinney has adopted the memorandum filed in support of Nations' motion to dismiss.

The defendants contend in their motions to dismiss that the counts within the indictment charging interstate transportation of stolen property or wire fraud should be dismissed

because they fail to state an offense. The defendants further contend that since these activities constitute the predicate for the RICO offenses charged in Counts One and Two of the indictment, that those charges too must be dismissed. The Court has carefully reviewed defendants' allegations and finds them to be without merit.

The defendants argue that the alleged interstate transportation of tapes involved in this case cannot constitute an offense under 18 U.S.C. §2314. There is, however, substantial competent authority contrary to this position. Recent decisions in the District of Columbia, Seventh and Ninth Circuits, have all concluded that criminal copyright infringement may be the underlying crime in a §2314 violation. *See United States v. Whetzel*, 589 F.2d 707, 710 n.10 (D.C. Cir. 1978); *United States v. Berkwitt*, 619 F.2d 649 (7th Cir. 1980); *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977); *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978). The defendants' argument that Counts Eleven through Forty-nine do not state an offense under 18 U.S.C. §1343, as well as defendants' arguments that Count Fifty does not state an offense, that the forfeiture provision in Count Two is improper, and that the indictment has not been properly executed by the Foreman of the Grand Jury, are all clearly without merit and as such are not a proper basis for dismissing any count of this indictment. It is therefore

ADJUDGED;

That motions to dismiss filed by defendants George Washington Cooper, III, Jerry Herbert Jones, Ferrol "Bud" McKinney, Robert Lee Nationa, Curtis R. Snipes, John C. McCulloch and Jack Reeves Wynn, III, are denied.

ORDERED at Jacksonville, Florida, this 20th day of October, 1980.

Howell W. Milton

UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO.: 80-67-Cr-J-M

UNITED STATES OF AMERICA

vs.

RICHARD NEIL TURNER, SR.
et al.

ORDER

The Court having reviewed the Magistrate's Report and Recommendation filed October 20, 1980, and having conducted an independent review of the entire record, and there being no objections filed by any of the defendants to the Magistrate's Report and Recommendation, the Court is of the opinion that the Magistrate's recommendation should be adopted. It is, therefore

ADJUDGED:

That the Magistrate's report in this case filed October 20, 1980, recommending that the motions to suppress be denied, is hereby approved and adopted as the opinion of this Court.

ORDERED at Jacksonville, Florida, this 31st day of October, 1980.

Howell W. Melton
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

APPENDIX B

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

Larry DRUM, John C. McCulloch, Ferroll "Bud" McKinney, Curtis R. Snipes, George Washington Cooper, III, Jerry Herbert Jones, Defendants-Appellants

UNITED STATES OF AMERICA

Defendant-Appellee

v.

Frances LOCKAMY

Defendant-Appellant

Nos. 81-5450, 81-5986

United States Court of Appeals
Eleventh Circuit.

June 8, 1984.

Appeals from the United States District Court
for the Middle District of Florida

Before RONEY and HENDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

ALBERT J. HENDERSON, Circuit Judge:

After a jury trial in the United States District Court for the

Middle District of Florida, the appellants were convicted of various crimes enumerated in a 78-count indictment charging a Racketeering Influenced Corrupt Organizations (RICO) conspiracy, 18 U.S.C. § 1962(d); a RICO substantive offense, 18 U.S.C. § 1962(c); Interstate Transportation of Stolen Property (ITSP), 18 U.S.C. § 2314; Wire Fraud, 18 U.S.C. § 1343; copyright conspiracy, 18 U.S.C. § 371; and copyright substantive violations, 17 U.S.C. § 106(3) and 506(a).[1]

The indictment arose from the operation of an enterprise involved in the manufacture and distribution of "pirated"[2] eight track and cassette tapes. The copyright violations allege criminal infringement of the copyright in certain sound recordings. The wire fraud counts charge a scheme to defraud copyright owners, sound recording companies, recording artists and musicians, the public and other individuals and businesses dealing in and purchasing recordings. The ITSP counts involve the interstate transportation of pirated tapes of a value in excess of $5,000. The RICO conspiracy and substantive counts assert that the defendants were employed by and affiliated with an enterprise, that is, a group of

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[1] The particular offenses were convicted are:

Jerry Herbert Jones—RICO conspiracy (Count 1), RICO substantive offense (Count 2), ITSP (Counts 4—9), Wire fraud (Counts 13—19, 21), and copyright conspiracy (Count 50).

John C. McCulloch—RICO conspiracy (Count 1), RICO substantive offense (Count 2), ITSP (Counts 4¢9), Wire Fraud (Counts 20—24), and copyright conspiracy (Count 50).

Curtis R. Snipes—RICO conspiracy (Count 1) RICO substantive offense (Count 2), Wire Fraud (Counts 13, 25—88), and copyright conspiracy (Count 50).

Ferrol "Bud" McKinney—RICO conspiracy (Count 1), RICO substantive offense (Count 2), ITSP (Count 3), Wire Fraud (Counts 29—31, 33—34), copyright conspiracy (Count 50), and copyright substantive offenses (Counts 51—54, 65).

Frances Lockamy—RICO substantive (Count 2), ITSP (Count 3), Wire Fraud (Counts 29, 32, 34—36), and copyright conspiracy (Count 50).

George Washington Cooper III—RICO conspiracy (Count 1), RICO substantive offenses (Count 2), Wire Fraud (Counts 38, 40—44), and copyright conspiracy (Count 50).

Larry Darrell Drum—copyright conspiracy (Count 50).

[2] As used in the indictment, the term "pirate" refers to the unauthorized and unlawful reproduction of copyrighted sound recordings.

individuals associated in fact to operate an eight-track and cassette tape copyright infringement business. The defendants were alleged to have participated in the conduct of the enterprise's affairs through a pattern of racketeering activity which consisted of the predicate acts of ITSP and wire fraud.[3]

In this consolidated appeal, all the defendants-appellants claim that the ITSP counts must fail because the pirated tapes in issue were copied from legitimately acquired phonorecords, and thus they were not "stolen" property within the meaning of 18 U.S.C. § 2314.

Extending this argument further, the appellants contend that the invalidity of their ITSP convictions nullifies sufficient predicate acts to sustain the RICO convictions. They further argue that the Wire Fraud convictions must be set aside because the wiretaps utilized to gather certain evidence for their convictions were authorized for the investigation into the ITSP charges.

Ferrol "Bud" McKinney urges that his individual participation was excused because the Federal Bureau of Investigation ("FBI"), which launched the investigation at the instance of and with the authority of the recording industry, purchased tapes from him. McKinney also claims that the government failed to overcome his "first sale" defense at trial.

Larry Drum asserts that his trial was improperly joined with that of the other appellants, and that the prosecutor made improper remarks during his closing argument.

After reviewing the record and applicable case law, we find no error in the conduct of the trial and affirm the convictions.

The principal issue in this appeal is whether the National Stolen Property Act, 18 U.S.C. §2314, proscribes the conduct of the defendants in the case. Under section 2314, it is a

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[3] None of the appellants attack the sufficiency of the evidence in such a manner as to require an exhaustive review of the facts. Rather, the appellants raise various legal challenges to specific conduct. The recitation of facts necessary to the resolution of such challenges are thus set forth as specifically relevant.

federal felony to transport "in interstate or foreign commerce any goods, wares (or) merchandise . . . of the value of $5,000.00 or more, knowing the same to have been stolen, converted, or taken by fraud . . ." The appellants maintain that the transportation of unauthorized copies of tapes is not a violation of section 2314 because copyrights are not "goods, wares or merchandise", and cannot be characterized as "stolen, converted or taken by fraud" within the meaning of the statute.

[1] This contention was recently rejected in *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984), in which it was held that the intangible idea protected by a copyright is effectively made material by its embodiment upon tape and therefore constitutes "goods, wares, or merchandise" that may be "stolen, converted or taken by fraud." *Id.* at 1520.

The appellants attempt to distinguih *Gottesman* by pointing out that *Gottesman* involved the reproduction of stolen copyrighted works whereas here the recordings reproduced here were acquired from legitimate sources. They cite the Fifth Circuit Court of Appeals decision in *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), to support this view. The court there held that the reproduction and interstate transportation of legitimately acquired copyrighted works does not constitute an offense under section 2314.[4]

This distinction is not meaningful when considered in the light of the purposes of the statute. The evil which Congress addressed in the National Stolen Property Act was the interstate traffic in stolen property. Where, as here, copyrighted material has been reproduced and distributed without the authority of the copyright owners, the property rights of owners are certainly affected adversely.

We have previously noted that copyrights, once given tangible form, may be "stolen, converted or taken by fraud" and

---

[4] In *Smith*, the copyrighted works were taped "off the air." The *Smith* court held that such copying does not come "within the ambit of §2314." 686 F.2d at 243 n. 17.

fall within the reach of section 2314. The term "conversion," as defined by the Supreme Court, directly applies here:

> Conversion . . . may be consumated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. *It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for a limited use.* (Emphasis added).

Morissette v. United States, 342 U.S. 246, 271–72, 72 S.Ct. 240, 254, 96 L.Ed. 288, 305 (1951). *See United States v. Sam Goody, Inc.,* 506 F.Supp. 380, 386, 390 (E.D.N.Y. 1981). The defendants were entitled to enjoy the copyrighted works as recorded on generally available phonorecords and tapes. They were not authorized to reproduce and distribute multiple copies of the copyrighted works. It is thus clear that the defendants' activities constituted use of copyrighted property in an unauthorized manner.

The rights of copyright owners in their property are just as deserving of protection as those of the owners of other types of property. *See States v. Belmont,* 715 F.2d 459, 461 (9th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 1275, 79 L.Ed.2d 679 (1984). We disagree with the distinction made in *Smith* and urged by the appellants, finding the genesis of their unauthorized appropriations irrelevant to the charges against them. Simply stated, legitimate acquisition of copyrighted material does not ameliorate the effect of subsequent illegal duplication and distribution of that material. The prohibitions contained in section 2314 applied to the activities of the defendants.

Our conclusion that the unauthorized duplication and interstate distribution of the tape recordings constituted a violation of section 2314 immediately settles three other issues raised by the appellants. First, it validates all convictions under the ITSP statute. Second, it affirms the utilization of the

ITSP counts as predicate RICO acts, thereby sustaining the RICO convictions. Finally it validates both the use of the wiretap and the Wire Fraud convictions stemming therefrom because the ITSP violations furnished sufficient probable cause for the wiretap order.[5]

The copyright owners who were the victims of the piracy scheme cooperated with the undercover investigation by permitting the FBI to deal with the defendants for the sale and distribution of the pirated tapes. McKinney somehow perceives that permission as authority for him to engage in tape piracy because the FBI purchased some of the tapes from him.

There is no evidence whatsoever that the victim recording companies authorized the tape pirates themselves to continue their unlawful duplication and distribution. Moreover, there is evidence that McKinney engaged in the duplication and sale of copyrighted tapes prior to the intitiation of the FBI investigation. Even at the time of his transactions with the FBI, he sold pirated tapes to other customers, none of whom were investigating him at the instance of or with the approval of the recording industry.[6]

McKinney attacks the sufficiency of the evidence to negate the "first sale" defense which he raised at trial. The "first sale" doctrine provides that:

> [W]here a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that *particular copy*. (Citations omitted.) Although the owner's other copyright rights remain intact, (*e.g.*, publishing or *copying*), the copyright owner has no right under the

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[5] Our holding with respect to these assignments of error makes it unnecessary to review the other reasons advanced by the government in support of the RICO and the Wire Fraud convictions.

[6] McKinney's argument strains credulity. Acceptance of his "vicarious authoriztion" premise would eliminate all prosecutions of tape piracy resulting from covert investigations conducted with or without the blessing of victims.

> copyright statute to restrict subsequent sales or transfers of *that copy*. (Emphasis added).

United States v. Moore, 604 F.2d 1228, 1232 (9th Cir.1979). *Accord, United States v. Drebin*, 557 F.2d 1316, 1329—31 (9th Cir. 1977), *cert. denied*, 436 U.S. 904, 98 S.Ct. 2232, 56 L.Ed.2d 401 (1978); *United States v. Atherton*, 561 F.2d 747, 750 (9th Cir. 1977).

[2] The doctrine only applies to copies lawfully made, *American Intern. Pictures, Inc. v. Forman*, 576 F.2d 661, 663 (5th Cir.1978), and sanctions only the sale of a particular lawfully made copy, not its reproduction. *United States v. Powell*, 701 F.2d 70, 72 (8th Cir.1983). Thus, where the source of copies is unlawful, the doctrine is not implicated. *United States v. Moore*, 604 F.2d at 1232 ("A pirated tape that is reproduced from the original recording without authorization is plainly not the subject of a first sale."); *United States v. Gottesman*, 685 F.2d 1387 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1256—57, 75 L.Ed2d 484 (1983) ("proof that no first sale had occurred was not required because the government established that the tapes were pirated").

[3] The government may prove the absence of a first sale by direct evidence of the source of the pirated recordings or by circumstantial evidence that the recording was never authorized. *United States v. Moore*, 604 F.2d at 1232; *United States v. Whetzel*, 589 F.2d 707, 711—12 (D.C.Cir1978). Here, compelling evidence sustains both methods of proof.

[4] First, the government produced direct evidence of the illicit source and origin of the pirate tapes. There was evidence that the enterprise legitimately purchased record albums and later unlawfully duplicated them and then distributed the copies for sale. Second, there was circumstantial evidence from which it could be concluded that the recording was unauthorized—inferior labels listing fictitious manufacturers and addresses, low prices, and clandestine circumstances of the sale. The evidence was thus entirely adequate to rebut the

first sale defense.[7]

Larry Drum contends that his joinder with the other co-defendants for trial on the RICO conspiracy charge impermissibly prejudiced his trial for copyright conspiracy.[8] This, he claims, resulted in a "prejudicial transfer of guilt" to him and was responsible for his conviction on the copyright conspiracy count.

Prior to the trial, On September 29, 1980, Drum moved for severance of his trial pursuant to Fed.R.Crim.P. 14, alleging that he would be prejudiced by the admission of statements of co-defendants and by the fact that he was a minor figure in the purported enterprise. Nine days later, before the district court, Drum withdrew the motion, stating that withdrawal appeared to be in his best interest.

[5] Despite his withdrawal, Drum relies on Rule 14 in alleging that he was "impermissibly prejudiced" by the joinder with his co-defendants. This reliance must fail, because claims under Rule 14 are reviewable only for abuse of discretion, *United States v. Marionneaux*, 514 F.2d 1244, 1248 (5th Cir.1975), *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed2d 189 (1977),[9] and there can be no such abuse where the district court never exercised its discretion.

In an effort to overcome this waiver impediment, Drum seeks to place the joinder issue within the framework of Fed.R.Crim.P. 8 which relates to causes of misjoinder. Rule 8 provides:

> **(a) Joinder of Offenses.** Two or more offenses may be charged in the same indictment or informa-

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[7] The trial court also correctly instructed the jury on the first sale doctrine.

[8] Drum was indicted both for RICO conspiracy (Count 1) and Copyright conspiracy (Count 50). The overt acts alleged in support of Count 1 were realleged in Count 50, and no new, separate or distinct acts were asserted in Count 50. Drum was acquitted on Count 1 but found guilty on Count 50.

[9] *In Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) *(en banc)*, the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

> tion in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> **(b) Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

[6] Normally, a defendant who fails to move for a severance because of improper joinder is barred from pursuing it on appeal. *United States v. DeLeon*, 641 F.2d 330, 337 (5th Cir. Unit A 1981); *accord, United States v. Bailey*, 675 F.2d 1292, 1294 (D.C.Cir.), *cert. denied sub nom Walker v. United States*, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982). Courts have recognized certain instances where the failure to so move was not fatal to an appeal, *see, e.g., United States v. Sanchez*, 532 F.2d 155 (9th Cir.1976) (joinder, though not complained of, "was a manifest injustice and constitutes plain error" under Fed.R.Crim.P. 52(b)). Drum, however, has not made any showing of "manifest injustice" resulting from the joinder.

[7] In any event, the copyright conspiracy transpired simultaneously with the RICO conspiracy. Indeed, identical overt acts were alleged to support both. It is clear, then, that the two conspiracies were properly joined under Rule 8(b).

Drum finally complains that the prosecutor made improper remarks which prejudicially affected his right to a fair trial. We have examined these statements in the context of the entire trial and find no error of such magnitude as to warrant a

reversal.

[8] The prosecutor referred to Drum as a "racketeer" and "tape pirate." Given the fact that there was ample evidence to infer that he was a criminal copyright infringer and that he participated in racketeering activity, the references were not such impermissible exaggerations as to mischaracterize his role in the criminal ventures. *See United States v. Taxe,* 540 F.2d 961, 968 (9th Cir.1976), *cert. denied,* 429 U.S. 1040, 97 S.Ct. 737, 50 L.Ed2d 751 (1977) (not prejudicial to refer to defendant tape pirate as "scavenger" and "parasite").

Drum's reliance on *United States v. Smith, supra,* to support his argument that the government wrongfully referred to the ITSP charges against him is equally without merit. Having previously expressed our disagreement with the Fifth Circuit Court of Appeals decision in *Smith,* we find no error in the prosecutor's statements with respect to the ITSP violations. Moreover, the RICO count, in which Drum was charged, was predicated on the ITSP violations and it was incumbent upon the government to prove Drum's participation in that conspiracy.

[9] Drum next faults the government's mention that the defendant's wives participated in the criminal activities but had not been indicated, claiming that it was an inference that the wives were not called to testify on behalf of their husbands because their testimony might be damaging. The government statement came in rebuttal to a defense argument suggesting favoritism, and was an attempt to persuade jury that the government had fairly brought the indictment in this case. Thus, the defendants invited the remark.

[10] The final charge of prosecutorial misconduct relates to the fact that the district court was forced to sustain nine objections to the government's rebuttal argument. These improper remarks, Drum argues, amounted to "pronounced and persistent misconduct" warranting reversal of his conviction. The district court sustained all of the objections, so we cannot say that the statements had a prejudicial effect on the outcome of

the case.[10] Furthermore, Drum was convicted on but one of the two counts charged against him. This alone is telling proof that he was not prejudiced by the prosecutor's remarks. *United States v. Cartwright,* 632 F.2d 1290, 1294 (5th Cir.1980).

The judgments of conviction are

AFFIRMED

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[10]We further observe that the jury was instructed that neither the opening statements nor the closing arguments constituted evidence.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5450

UNITED STATES OF AMERICA

versus

LARRY DRUM, JOHN C. McCULLOCH, FERROLL "BUD" McKINNEY, CURTIS R. SNIPES, GEORGE WASHINGTON COPPER, III, JERRY HERBERT JONES

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

Before RONEY and HENDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of appellant McKinney in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APPENDIX D

18 USCS Section 2314.

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof --

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

APPENDIX E

Section 106. Exclusive rights in copyrighted works

Subject to sections 107 through 118 [17 USCS Sections 107—1181], the owner of copyright under this title [17 USCS Sections 101 et seq.] has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to distribute derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Added Oct. 19, 1976, P.L. 94-553, Title I, Section 101, 90 Stat. 2546.)

Section 506. Criminal offenses

(a) Criminal infringement. Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both: Provided, however, that any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsections (1), (2), or (3) of section 106 [17 USCS Section 106 (1). (2), or (3)] or

the copyright in a motion picture afforded by subsections (1), (3), or (4) of section 106 [17 USCS Section 106 (1), (3) or (4)] shall be fined not more than $25,000 or imprisoned for the first such offense and shall be fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense.

(2) Forfeiture and destruction. When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.

(c) Fraudulent copyright notice. Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows is to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than $2,500.

(d) Fraudulent removal of copyright notice. Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than $2,500.00.

(e) False representation. Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409 [17 USCS Section 409], or in any written statement filed in connection with application, shall be fined not more than $2,500.

(Added Oct. 19, 1976, P.L.94—553, Title 1, Section 101, 90 Stat. 2586.)